MOTION FILED
APR 17 1998

(3)

No. 97-1320

In The

Supreme Court of the United States

October Term, 1997

BRUCE W. DAVIS, et al.,

Petitioners,

v.

THE CITY OF HOLLYWOOD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION AND BRIEF ON BEHALF OF AMERICAN WORKERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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25 pp

AMICUS CURIAE'S MOTION FOR PERMISSION TO FILE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amicus Curiae, DONALD J. JARET, ESQUIRE, hereby moves this Honorable Court for permission to file his Amicus Curiae Brief in support of Plaintiff/Appellant's Petition for Writ of Certiorari and in support thereof states:

1. The movant is familiar with and has reviewed the proceedings in this case as well as the Petition for Writ of Certiorari.

2. The movant is familiar with the rules of this Court requiring that the movant's brief may only be filed with the consent of the parties to this action or with leave of court.

3. The movant has contacted Counsel for Petitioner and Counsel for Respondent with respect to the receipt of permission to file this Brief. Brenda Carter, Esquire, Counsel for Petitioner has consented to the filing of this brief and Joseph Serota, Esquire, Counsel for Respondent, does *not*. This Brief may not be filed absent leave of court.

4. Leave of Court should be granted because this case involves important constitutional issues not heretofore raised by the parties or considered by this Court. The Salary Basis Regulation in general and the Window of Correction portion of such regulation in particular have been and continue to be the subject of significant judicial activity. This Court's decision in *Auer v. Robbins*, 117 S.Ct. 905 (1997), was but the first step in what will be a long and difficult process of determining the meaning and application of the Window of Correction Regulation,

29 C.F.R. § 541.118 (a)(6), if that regulation is, in fact, constitutional. The movant, therefore, respectfully requests that this Court consider the constitutionality of the Window of Correction Regulation prior to this Court's interpreting and issuing guidance as to the meaning and application of that regulation.

5. It is this Court's prerogative to determine the constitutionality of any statute or regulation. While Petitioners did raise the validity of the Window of Correction below and included that issue as a question presented to this Court in their Petition, they did not directly address its constitutionality. This is especially so in light of over two hundred (200) years of this Court's precedent holding statutes and regulations of the nature of the Window of Correction unconstitutional. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Gordon v. U.S.*, 117 U.S. 697 (1864); *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

6. The interest of the movant is threefold. Firstly, consistent with all members of the Bar, the movant wishes to preserve this Court's precedent of not issuing advisory opinions and preserving the case or controversy requirement of the United States Constitution. Secondly, the movant is presently representing clients who are before the Eleventh Circuit Court of Appeals concerning the meaning, interpretation and application of the Window of Correction Regulation. It is the interest of the movant and his clientele to assist this Court in considering all points of view, arguments and analyses as part of its rendering an opinion concerning the Window of Correction Regulation. Thirdly, the movant has an interest in preserving and protecting the rights of employees and

their right to representation by competent counsel in pursuing Fair Labor Standards Act claims. This is both a financial interest of the movant and a professional and ethical interest of the movant.

7. Interpretations afforded the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the Department of Labor Regulations thereunder concern many, if not all, of this country's working men and women. Cases such as this, may have a chilling effect upon their exercise of federally protected rights. 29 U.S.C. § 201 *et seq. Davis* will most assuredly have a chilling effect on FLSA civil enforcement actions. If the *Davis* decision stands all American workers will suffer. Enforcement of the FLSA will suffer. Workers, although armed with seemingly valuable rights under the Fair Labor Standards Act, will be hesitant to enforce those rights, and the availability of counsel to assist workers will be greatly diminished, if not totally dissipated. The Fair Labor Standards Act will, thus, be rendered nothing more than a statement of rights with no remedies. A dark day for all workers.

8. The movant has not and will not receive any compensation for costs or time expended in the preparation and filing of this Amicus Brief. No party to this action or their counsel prepared or assisted in the preparation of this brief.

WHEREFORE, the movant respectfully requests that this Honorable Court grant the movant leave to file his Brief in support of the Petition for Writ of Certiorari.

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STATEMENT OF MOVANT'S INTEREST

The interest of the movant is to preserve this Court's precedent of not issuing advisory opinions and preserving the case or controversy requirement of the United States Constitution and to safeguard the protection afforded American workers by the Fair Labor Standards Act.[1]

INTRODUCTION

The movant files this brief in support of the Petition for Writ of Certiorari to raise serious constitutional issues concerning the Department of Labor Window of Correction Regulation. These issues have heretofore not been raised by any party to this action and must be addressed prior to this Court's providing guidance or interpretation concerning that regulation.

SUMMARY OF ARGUMENT

The Window of Correction provision of the Department of Labor's interpretative regulations (hereinafter the "Window of Correction" or the "Regulation"), 29 C.F.R. § 541.118(a)(6), deprives the Federal Courts of their constitutional right to exercise the judicial power granted

[1] Petitioner has consented to the filing of this brief, Respondent has not. No part of this brief has been prepared or authored by counsel for a party and the movant has borne all costs and expenses of this brief.

pursuant to Article III § 2 of the United States Constitution. The Regulation accomplishes this by rendering decisions of Article III courts non-binding on *all* parties thereto depriving such courts of their inherent power to enforce and carry into effect their judgment.

The Regulation is an interpretation by the executive branch of government, the Secretary of Labor, delegating to a litigant, the party against whom a "judicial determination" has been made, the right and power to disregard that judicial determination. This right and power may be exercised at any time. *Auer v. Robbins*, 117 S.Ct. 905 (1997).

Allowing the party against whom an adverse "judicial determination" has been rendered to avoid that determination contravenes over 200 years of judicial precedent. As early as 1792 in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), this Court held that advisory and non-binding opinions were constitutionally prohibited. Thereafter, in *Gordon v. U.S.*, 117 U.S. 697, 702 (1864) and *Chicago & Southern Airlines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), this Court invalidated an act of Congress reserving to the executive branch the power to disregard a judicial determination. In *Town of Deerfield v. FCC*, 992 F.2d 420, 427-29 (2d Cir. 1993), a regulation reserving to an executive agency the power to disregard the judgment of an Article III Court was held unconstitutional.

This Court's decisions in *Hayburn's Case*, *Gordon*, and *Chicago & Southern*, and the Second Circuit's decision in *Town of Deerfield* require the Regulation be found unconstitutional as violative of Article III § 2 of the United States Constitution.

The interpretation afforded the Window of Correction by the lower courts has created unfair, inequitable and arbitrary and capricious results. *See, Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997); *Eugene v. McDonald's*, Case No. 96-2324-Civ-Highsmith, Order Denying Plaintiff's Motion for Award of Attorney's Fees and Reasonable Expenses dated January 22, 1998 (S.D. FL.) (hereinafter referred to as the "Eugene Order"); *Eugene v. McDonald's*, Case No. 96-2324-Civ-Highsmith, Final Order of Dismissal entered April 23, 1997 (hereafter the "Eugene Judgment").

ARGUMENT

I. THE ROLE OF THE JUDICIARY CANNOT BE ASSIGNED TO OTHERS

A. THE REGULATION

The Fair Labor Standards Act (hereinafter "FLSA") requires non-exempt employees be paid time and one-half for all hours worked in excess of forty per work week. 29 U.S.C. § 207. Although most employees are not exempt, the FLSA exempts, inter alia, executive, professional and administrative employees if paid on a "salary basis". 29 U.S.C. § 213; 29 C.F.R. § 541.118(a). It is, therefore, necessary to determine whether an employee performing executive, professional and/or administrative duties is paid on a "salary basis".

The Department of Labor has adopted regulations defining the term "salary basis". 29 C.F.R. § 541.118(a). This Court has held those regulations valid. *Auer*, 117

S.Ct. at 910. The "salary basis" regulations provide employees are paid on a "salary basis" only if their pay is not subject to reduction based on the quality or quantity of work. 29 C.F.R. § 541.118(a). An employee whose weekly pay is subject to reduction for disciplinary reasons is not paid on a salary basis, is not exempt as an executive, professional and/or administrative employee, and is entitled to overtime compensation. *Id.*; *Klein v. Rush Presbyterian – St. Lukes Medical Center*, 990 F.2d 279 (7th Cir. 1993); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992).

In certain instances where an employee is determined not to be exempt solely because he or she is not paid on a "salary basis" the Department of Labor created the Window of Correction. The Window of Correction allows an employer to restore exempt status by repaying to the employee all impermissible deductions and promising to comply in the future. *Id.* The only circumstance in which an employer may use the Window of Correction is where an impermissible deduction occurs resulting in the loss of an otherwise applicable exemption.

An employer may invoke the Window of Correction at any time. *Auer*, 117 S.Ct. at 910. An employer may, therefore, fully litigate an employee's entitlement to overtime compensation in the trial and appellate courts prior to its use of the Window of Correction. *Id.* In the event the employer prevails at trial or on appeal, the Window of Correction is inapplicable because it only applies in those instances where exempt status is lost due to impermissible deductions. 29 C.F.R. § 541.118(a)(6). However, in the event the employee prevails, i.e., the employee is "judicially determined" not exempt and, therefore, entitled to

overtime compensation, the employer may then invoke the Window of Correction restoring the exemption and denying the employee overtime compensation. *Auer*, 117 S.Ct. at 910.

B. 206 YEARS OF PRECEDENT IGNORED

The Window of Correction as heretofore interpreted by this Court in *Auer* and the Eleventh Circuit Court of Appeals in *Davis* is both an unconstitutional exercise of and infringement upon the power of the judiciary by the executive branch of government, and at odds with the remedial purposes and intent of the statute it seeks to "interpret". *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 1 L.Ed. 436 (1792); *U.S. v. Ferreira*, 54 U.S. (13 How.) 40, 14 L.Ed. 42 (1852); *Gordon v. U.S.*, 117 U.S. 697, 702 (1864); *District of Colombia v. Eslin*, 183 U.S. 62, 65 (1901); *Muskrat v. U.S.*, 219 U.S. 346 (1911); *Chicago & Southern Airlines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (Article III gives the judiciary " . . . the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that a judgment conclusively resolves the case because a judicial power is one to render dispositive judgments); *Town of Deerfield NY v. FCC*, 992 F.2d 420, 427-29 (2d Cir. 1993).

This Court as well as many trial and appellate courts have recently had the opportunity to interpret the Regulation. *Auer*, 117 S.Ct. at 910; *Davis*, 120 F.3d at 1181; *Kuchinkas*, 840 F.Supp. 1548; *Eugene*, Case No. 96-2324-Civ-Highsmith (S.D. Fl. 1997). These interpretations focused far too narrowly on the precise wording of that regulation, while failing to address the important constitutional and social ramifications flowing from those interpretations.

This Court has unwaveringly held that a concrete and real case or controversy must exist prior to rendering a *judicial determination binding upon the parties thereto.* In *Gordon v. U.S.*, 117 U.S. 697, 704 (1864), Chief Justice Taney so eloquently stated:

> Indeed, no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated – that is, that the Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.

In *Gordon*, this Court held unconstitutional an act of Congress reserving to the Secretary of the Treasury the power to enforce a judicial determination stating:

> The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and

> without any operation upon the rights of the parties. . . . Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction: yet it is the whole power the Court is allowed to exercise under this act of Congress. *Id.* at 702.

Issues relating to Article III of the Constitution, specifically the rendition of an opinion not final, conclusive and binding upon the parties, warrants an extensive constitutional analysis. *See, Gordon,* 117 U.S. 697 (1864). The subject Department of Labor Regulation, 29 C.F.R. § 541.118(a)(6), has yet to undergo such scrutiny. It is respectfully submitted that if this Court grants Certiorari the Window of Correction Regulation will not survive.

C. THE AGONY OF VICTORY AND THE THRILL OF DEFEAT.

The Regulation's infringement on the judicial power of Article III courts and the absurd, inequitable and arbitrary results flowing from current interpretations of that regulation is demonstrated by the following example. Mr. Smith sues Company X for overtime compensation alleging Company X made improper deductions from his and others weekly compensation in violation of the Department of Labor salary basis regulation (29 C.F.R. § 541.118). This is precisely the claim maintained by Messrs. Auer, Davis, Kuchinkas and Eugene.

Company X argues the salary basis regulation is invalid. Mr. Smith never worked more than forty hours per work week, and on and on. These defenses are quite

similar to those raised by the City of Hollywood, Mr. Robbins, Broward County, and McDonald's.

Company X loses in the District Court and is ordered to pay Mr. Smith $50,000.00 in overtime compensation, liquidated damages of $50,000.00 and Mr. Smith's attorney's fees and costs. 29 U.S.C. § 216(b). Mr. Smith is, thus, "judicially determined" non-exempt and entitled to overtime compensation.

Company X has two options. It may invoke the Window of Correction. *Auer*, 117 S.Ct. at 912. In this event, despite the total absence of judicial intervention, the "judicial determination" of the district court that Mr. Smith is not exempt and accordingly entitled to overtime compensation becomes inoperative and nugatory (in the words of former Chief Justice Taney) leaving Mr. Smith without a remedy. Company X may unilaterally elect to ignore and disregard the "judicial determination" of the trial court and reimburse Mr. Smith for all disciplinary deductions from his pay, a two hour docking of $50.00. 29 C.F.R. § 541.118(a)(6). It's entirely up to Company X. *Auer*, 117 S.Ct. at 912; *Davis*, 120 F.3d at 1181. In the words of Judge Highsmith, if Company X invokes the Window of Correction it is to be " . . . treated, for all practical purposes, as if the alleged infraction never occurred." *Eugene*, Final Order at p. 2. How did the infraction never occur if the trial court made a "judicial determination" that it did, in fact, occur? The district court's "judicial determination" is nothing more than an advisory opinion. *Gordon*, 117 U.S. at 702.

The "judicial determination" of the trial court would certainly be binding on Mr. Smith had it ruled in Company X's favor. *See, Davis*, 120 F.3d 1178. Under these circumstances Company X would afford the "judicial determination" full and complete validity not subject to challenge other than by appeal. *Id.* The court, therefore, has the judicial power to bind the plaintiff, but not the defendant.

Company X may exercise its second option and appeal without invoking the Window of Correction. *Auer*, 117 S.Ct. at 912. A panel of appellate judges would then review the trial court's "judicial determination" that Mr. Smith is not exempt and, therefore, entitled to overtime compensation.

If the district court's "judicial determination" is affirmed, Company X would then be faced with the same two choices it had before appeal. Company X could invoke the Window of Correction. *Auer*, 117 S.Ct. at 912. In this event both the "judicial determination" of the district court and appellate court that Mr. Smith is not exempt and, therefore, entitled to overtime compensation would be rendered inoperative and nugatory (in the words of former Chief Justice Taney) at the option of Company X. In the words of Judge Highsmith, "the alleged infraction never occurred" despite the trial and appellate courts findings to the contrary. *See, Gordon*, 117 U.S. at 702; *Chicago & Southern*, 333 U.S. at 113; *Town of Deerfield*, 922 F.2d at 427-29. Company X could pay Mr. Smith the $50.00 deducted from his pay, not the judgment awarded by the district court and affirmed on appeal. 29 C.F.R. § 541.118 (a)(6). The appellate court has, thus, not

made a "judicial determination" at all, but has rendered a non-binding advisory opinion to Company X. *Id.*

To add insult to injury, this Court may very well be brought into the fray. *Auer*, 117 S.Ct. at 912. If this Court grants Certiorari and affirms the "judicial determination" of the district and appellate courts that Mr. Smith is not exempt and, therefore, entitled to overtime compensation and his attorney's fees and costs, Company X has two options. The first is to pay Mr. Smith the $100,000.00 the district court, the appellate court and this Court "judicially determined" due and owing (as well as his attorney's fees and costs). The second is to invoke the Window of Correction. *Auer*, 117 S.Ct. at 912. Company X must now finally decide what to do. Does it ignore the "judicial determination" of the highest court of the land?

In whose favor has judgment been rendered? One could reasonably conclude that Mr. Smith did fairly well in his excursion through the federal court system. The trial court made a "judicial determination" that he was not exempt and entitled to overtime compensation. The appellate panel and this Court unanimously affirmed the trial court's decision. If Company X invokes the Window of Correction it appears Mr. Smith pitched a perfect game and, amazingly, lost.

D. *DAVIS* ADDS INSULT TO INJURY-WINNERS WEEPERS-LOSERS KEEPERS

To the well trained eye in the Eleventh Circuit Mr. Smith has not fared well. *Id.* He accomplished nothing despite his apparent success. The "alleged infraction" he

complained of "never occurred" notwithstanding the judicial determinations to the contrary by the trial and appellate courts. *See, Eugene,* Final Order at p. 2. Even though Company X has not heretofore been bound by any "judicial determination" in this case, 29 C.F.R. § 541.118(a)(6), Company X will move the trial court for recovery of its costs pursuant to Rule 54 of the Federal Rules of Civil Procedure. *Davis,* 120 F.3d at 1181. The trial court is bound to do so by the precedent in its circuit. *Id.* That's ironic, Company X using the judicial system to bind Mr. Smith by an exercise of "judicial power"!

Company X will seek the modest sum of $100,000.00 in costs for Mr. Smith's relentless application of the FLSA to it. Should Mr. Smith, the individual protected by the FLSA, be responsible for Company X's costs of defending an illegal pay policy? The Eleventh Circuit says so. *Id.*

E. THE MESSENGERS ARE NOW DEAD, BUT NOT FORGOTTEN

The more Mr. Smith wins, the more he pays! Mr. Smith should know better than attempting to utilize the FLSA to benefit others similarly situated to him who may be unaware of the violation of their legal rights. *See, Hoffmann-La Roche v. Sperling,* 493 U.S. 165 (1989); 29 U.S.C. § 216(b). This is why Mr. Smith must be forced to pay all the costs of Company X in this litigation while those similarly situated to him who benefitted from Company X's use of the Window of Correction must incur no such liability. *Davis,* 120 F.3d at 1181; *See,* 29 C.F.R. § 541.118(a)(6).

The message will be sent to all other Mr. Smiths that an overtime claim under the FLSA is certainly not a claim that should ever be raised. *See*, 29 U.S.C. § 202. If someone else raises the claim, one stands to benefit while the instigator suffers financial ruin. *Davis*, 120 F.3d at 1181. In ancient Rome they killed the messenger, didn't they?

F. THE LAWYERS – WHERE HAVE THEY GONE

As difficult as it may be to believe the plight of Mr. Smith, Mr. L, his counsel, has been placed in an equally untenable position. It was, after all, Mr. L who agreed to represent Mr. Smith and others similarly situated to him on a contingent fee basis expending hundreds of thousands of dollars in attorney's time and costs. Mr. L cannot rely on Mr. Smith for payment, especially in light of Mr. Smith's obligation to pay Company X's costs. *Davis*, 120 F.3d at 1181.

Is Mr. L entitled to recover attorney's fees and costs from Company X by his securing judgment in favor of Mr. Smith at trial, and having such judgment affirmed on appeal? 29 U.S.C. § 216(b); *see*, *Davis*, 120 F.3d at 1181; *Eugene*, Order; *Eugene*, Final Judgment. I think not. The reason: Company X used the Window of Correction so Mr. Smith was always exempt and not entitled to overtime compensation. *Id*. This is the case despite the trial and appellate court's "judicial determination" to the contrary.

Denying Mr. L the right to recover his attorney's fees and costs deprives FLSA claimants of the opportunity to be represented by skilled and competent counsel. *See*,

Fegley v. Higgins, 19 F.3d 1126, 1134-35 (6th Cir. 1994), *cert. den.*, 513 U.S. 875 (1994). In *Fegley*, the Sixth Circuit Court of Appeals held:

> The purpose of the FLSA attorney's fees provision is "to ensure effective access to the judicial process by providing attorney's fees for prevailing plaintiffs with wage and hour grievances". [citation omitted]. The Court should not place an undue emphasis on the amount of the plaintiff's recovery because an award of attorney's fees here encourages the vindication of congressionally identified policies and rights. *Id.*

Denying Messrs. Smith, Davis, Kuchinkas and Eugene the right to recover their attorney's fees and costs (and assessing Company X's costs against Messrs. Smith and Davis) contravenes the purpose and intent of the FLSA and its attorney's fee provision. 29 U.S.C. § 216(b). The Legislative History of the FLSA fully supports Messrs. Smith, Davis, Kuchinkas and Eugene's right to recover attorney's fees and costs wherein it states:

> Among the provisions for the enforcement of the act an old principle has been adopted and will be applied to new issues. If this shall occur violations of either the wages or hours, the employees can themselves . . . maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment *and shall also allow a reasonable attorney's fee and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. The provision has the further virtue of minimizing the cost of enforcement by the Government. It*

is both a common-sense and economical method of regulation. [Emphasis Supplied]. 83 Cong. Rec. 9264.

G. THE INFRACTION IS NOT MERELY ALLEGED – IT DID OCCUR

The state of the law cannot be as interpreted by the Eleventh Circuit Court of Appeals in *Davis*, Judge Highsmith in *Eugene* and Judge Ungaro-Benages in *Kuchinkas*. These unfortunate decisions emanate from the misapplication of an unconstitutional Department of Labor Regulation and evolve into a convoluted pattern of turning the law against those it was designed to protect.

The Regulation cannot serve as the basis for finding a violation that has been "judicially determined" to have occurred, did not occur. If an Article III court finds an employee not exempt and entitled to overtime compensation, the employee is not exempt and, therefore, is entitled to overtime compensation regardless of the "interpretation" of the Department of Labor or the actions of the party against whom that determination has been made. *Gordon*, 117 U.S. 697 (1865). There is simply no basis, constitutional or otherwise, for allowing the defendant to disregard that determination.

Sadly, the Department of Labor, the entity charged with protecting the rights of workers, is the architect of this convoluted concept. Logic and reason must be returned to this area of the law. *See, Dunlop v. Ashy*, 555 F.2d 1225, 1234 (5th Cir. 1977).

The absurdity and inequity of the Regulation can only be remedied by a definitive pronouncement by this

Court. That pronouncement must either find the Window of Correction invalid in its entirety, which the movant believes to be the case, or, if this Court finds the Window of Correction valid, this Court must inform all lower courts that the invocation of the Window of Correction results in the employee being a prevailing party entitled to recover attorney's fees and costs, that under no circumstances shall a party invoking the Window of Correction be entitled to recover costs pursuant to Federal Rule of Civil Procedure 54, and that the party invoking the Window of Correction must be compelled by a binding "judicial determination" to comply with each and every requirement of that provision with the court retaining jurisdiction to monitor and enforce that "judicial determination".

CONCLUSION

This Court has held that Congress cannot pass legislation reserving to itself the right to avoid the effect of a judicial determination. Similarly, this Court has held that Congress cannot enact legislation reserving to the executive branch of government the power to alter a judicial determination. Similarly, the Second Circuit Court of Appeals has held that the executive branch cannot by regulation reserve for itself the power to alter a judicial determination. It is, therefore, well established that acts of Congress and regulations of a department of the executive branch of government that allow the alteration of a judicial determination are unconstitutional. For this reason, the Window of Correction provision of the Department of Labor Regulations, 29 U.S.C. § 541.118(a)(6), is

unconstitutional. If the Department of Labor is prohibited from issuing a regulation reserving to itself the power to reverse a judicial determination, the Department of Labor certainly cannot delegate such power to another, much less the party adversely affected by that purported "judicial determination".

No meaningful distinction exists between the constitutionality of the Window of Correction Regulation and the laws and regulations heretofore invalidated by this Court. In fact, the Window of Correction Regulation poses more serious constitutional and regulatory concerns than those heretofore considered in *Hayburn's Case, Gordon, Chicago & Southern;* and *Town of Deerfield.* In the case sub judice the power to avoid a "judicial determination" arises via interpretative regulation promulgated by an executive agency of government (Department of Labor), not an Act of Congress. In *Hayburn's Case, Gordon* and *Chicago & Southern,* the power to avoid the judicial determination arose out of an "Act of Congress". To exacerbate the situation, in the case sub judice the power to avoid the "judicial determination" was not retained by the executive agency (Department of Labor) or by Congress, but was delegated to a litigant in the "adversary" proceedings against whom the "judicial determination" was made. The creation of a mechanism for the avoidance of a "judicial determination" by a department of the executive branch of government and the delegation of that power to the litigant against whom judgment has been entered presents a far more compelling argument for invalidation than any heretofore considered by this

Court. Has the Department of Labor not given the fox the keys to the hen house?

Respectfully submitted,

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